U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, N.W.
Washington, D.C. 20001-8002

Date: October 23, 1997

Case No.: 96-INA-00039

In the Matter of:

DMR GROUP, INC.,
Employer

On Behalf Of:

RICHARD JOHN HUDSON,
Alien

Appearance: Jeffrey J. Rummel, Esq.
For the Employer/Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On November 8, 1993, DMR Group, Inc. ("Employer") filed an application for labor certification to enable Richard John Hudson ("Alien") to fill the position of Senior Consultant (AF 20-21). The job duties for the position are:

> Responsible for providing direct coaching, quality assurance and project management support for company's proprietary Productivity Plus (P+) methodology in a variety of project environments. Specific job duties include providing direct support to project teams during all phases of the development cycle, from preliminary analysis through to final implementation. Also responsible for customizing P+ methodology for evolutionary prototypes.

Further, the Employer is requiring a high school diploma and seven years of experience in the job offered or seven years of experience in data and database administration, functional design, or project management in a large information processing environment. In addition, the Employer listed the following as Special Requirements:

> Experience must include hands-on work with software development, life cycle methodologies, as well as data and process modeling techniques; the use of CASE (computer-aided software engineering) tools; and the implementation of current state-of-the-art information systems and technologies. Experience in Productivity Plus (P+) is also required.

The CO issued a Notice of Findings on January 4, 1995 (AF 12-18), proposing to deny certification on several grounds. First, the CO found that the Alien did not have experience with P+ prior to his employment with the Employer. As such, the CO instructed the Employer to document that its requirements for the job opportunity represent the actual minimum requirements for the job in accordance with § 656.21(b)(5). In addition, the CO stated that this job opportunity does not require a degree past high school; however, similar position descriptions received from the Employer have required a Bachelor's Degree plus five to seven years of experience. Therefore, the CO asked the Employer to document the discrepancy. Finally, the CO found that the Employer did not establish that all U.S. workers were rejected solely for lawful, job-related reasons.

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

Accordingly, the Employer was notified that it had until February 8, 1995, to rebut the findings or to cure the defects noted.

In its rebuttal, dated March 7, 1995 (AF 11(A)-11(F)), the Employer contended that it is requiring seven years of work experience in lieu of a Bachelor's Degree because it recognizes that professional experience in the field may compensate for the lack of a degree. In addition, the Employer stated that, "the entire project is, in fact, based on P+ methodologies which are being customized to meet the needs of the client. It is not feasible to hire workers with less training or experience than that stated." The Employer further stated that the Alien is qualified for the job opportunity. In support of this contention, the Employer outlined the Alien's specific experience and the job duties for each position. Finally, the Employer stated that the two U.S. applicants in question were rejected because they currently work for Boeing and may have trouble obtaining a waiver to re-enter Boeing's premises to work on projects for the Employer.

The CO issued the Final Determination on May 26, 1995 (AF 4-11), denying certification because the Employer failed to establish that two U.S. applicants were rejected solely for lawful, job-related reasons.

On June 29, 1995, the Employer requested review of the Denial of Labor Certification (AF 2-3). The CO denied reconsideration on September 19, 1995, and forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board").

Discussion

Section 656.20(c)(8) provides that the job opportunity must have been open to any qualified U.S. worker. As such, employers are required to make a good-faith effort to recruit qualified U.S. workers for the job opportunity. *H.C. LaMarche Ent., Inc.*, 87-INA-607 (Oct. 27, 1988). Further, § 656.21(b)(6) provides that an employer must show that U.S. applicants were rejected solely for lawful, job-related reasons. Therefore, actions by the employer which indicate a lack of good-faith effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient U.S. workers who are "able, willing, qualified and available" to perform the work as required by § 656.1.

In the instant case, the CO found that the Employer failed to show that two U.S. workers, Mr. Piukkula and Mr. Morton, were rejected solely for lawful, job-related reasons. On the ETA 750 form, the Employer listed the duties for the job opportunity as:

> Responsible for providing direct coaching, quality assurance and project management support for company's proprietary Productivity Plus (P+) methodology in a variety of project environments. Specific job duties include providing direct support to project teams during all phases of the development cycle, from preliminary analysis through to final implementation. Also responsible for customizing P+ methodology for evolutionary prototypes.

Further, the Employer is requiring a high school diploma and seven years of experience in the job offered or seven years of experience in data and database administration, functional design, or project management in a large information processing environment (AF 20). In addition, the Employer stated that the applicant's experience must include hands-on work with software development, life cycle methodologies, as well as data and process modeling techniques; the use of CASE (computer-aided software engineering) tools; and, the implementation of current state-of-the-art information systems and technologies. Finally, the Employer noted that experience in Productivity Plus (P+) is also required. As outlined in the NOF, both Mr. Piukkula and Mr. Morton fulfill the requirements listed by the Employer (AF 15-16). However, neither of these individuals was afforded the opportunity to interview with the Employer.

In its recruitment report, the Employer stated that these individuals were rejected because they currently work for the Boeing Company and no Boeing employee can enter Boeing premises for the purpose of conducting business for a period of two years after his date of termination without a waiver(AF 27-28).[2] The Employer enclosed a letter from the Procurement Specialist for Boeing Computer Services which stated that waivers are only granted where the termination was due to no fault of the employee or in the situation where the return of the employee has unusual benefit to Boeing (AF 29).

In the NOF, the CO stated that he conducted a follow-up call to Mr. Hord, a supervisor at Boeing, who stated that one would not have a problem getting a waiver if there is no potential or perceived threat to the ethics of the company (AF 17). Accordingly, the CO requested that the Employer obtain a written statement from Mr. Hord regarding Boeing's waiver policy. In addition, the CO instructed the Employer to interview the applicants.

In rebuttal, the Employer asserted that it obtained a letter from Mr. Hord, as requested by the CO (AF 11(E)).[3] In addition, the Employer stated that it continued to reject the applicants due to the waiver issue.

In the Final Determination, the CO continued to find that the Employer failed to establish that these two applicants were rejected solely for lawful, job-related reasons. We agree with the CO for several reasons. First, the CO, in the NOF, explicitly instructed the Employer to interview the two applicants. However, the Employer ignored this request. Therefore, the Employer failed to rebut the NOF. Moreover, where an applicant's resume shows a broad range of experience, education, and training that raises a reasonable possibility that the applicant is qualified for the job opportunity, the employer bears the burden of further investigating (by interview or otherwise) the applicant's credentials. *Gorchev &Gorchev Graphic Design*, 89-INA-118 (Nov. 29, 1990) (*en banc*). As noted above, both applicants' resumes indicate that they are qualified for the job

[2] The Employer indicated on the application for labor certification that the individual filling this job opportunity will be assigned to the Boeing Company (AF 20).

[3] Although the Employer stated that the letter was attached, no letter was included in the file (AF 11(e)).

opportunity. Therefore, we find that the Employer had a duty, at the very least, to interview these applicants and then deal with the waiver issue.[4]

As such, we find that the Employer has not established that there are not sufficient U.S. workers who are "able, willing, qualified and available" to perform the work as required by § 656.1. Accordingly, the CO's denial of labor certification is hereby AFFIRMED.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.

[4] Based on the facts presented in this case, we acknowledge that the failure to obtain a waiver from the applicants' current employer may be a valid basis for rejection. Nonetheless, the Employer had a duty to interview these applicants before rejecting them on such grounds.